

**REMARKS**

This communication responds to the Final Office Action mailed December 22, 2005 and to the Advisory Action mailed March 13, 2006.

In the present communication, applicant has amended claims 5,12, 20, 26, 39 and 42. No new subject matter has been added to the claims.

Support for the amendments to the claims can be found in the specification at least at page 3, line 4; page 5, line 19; and page 6, lines 8-12.

Claims 13, 14, 27, 28, 43, and 44 have been canceled. Claims 1, 4, 16, 19, and 29-35 were previously canceled. Therefore, claims 2-3, 5-12, 15, 17, 18, 20-26, and 36-42 are pending.

The §§ 112, second paragraph and 103(a) rejections of the claims are respectfully traversed in view of the above amendments and the below discussion.

The amendment of the claims is to help more distinctly claim the invention and is not an acquiescence to any pending rejection. Applicant reserves the right to present the original claims in this or a continuation application. No prejudice shall be inferred by the amendments.

**Rejection of Claims 6, 12, 26, 38 and 42 under 35 U.S.C. § 112, second paragraph**

Claims 6, 12, 26, 38, and 42 were rejected under 35 U.S.C. 112, second paragraph. The § 112 rejection of the claims is respectfully traversed. However, claims 6, 12, 26, 38, and 42 were previously amended in the reply filed February 22, 2006, without adding new matter, in order to overcome the § 112, second paragraph rejection of the claims. It is noted that the claim amendments submitted on February 22, 2006 were entered.

Therefore, reconsideration and withdrawal of the § 112 rejections are requested.

**Rejection of Claims 1-2, 3, 5-15, 17, 18, 20-28 and 36-44 under 35 U.S.C. § 103(a)**

Claims 1, 2, 3, 5-15, 17, 18, 20-28 and 36-44 were rejected under 35 U.S.C. 103(a) as being unpatentable over the Office Action's assertion of admitted prior art in view of U.S. Patent No. 6,562,385 Neumann (hereinafter "Neumann") in view of U.S. Patent No. 4,623,542 Wallin et al. (hereinafter "Wallin").

The § 103(a) rejection is respectfully traversed for at least the following reasons, which are in addition to the reasons for traverse filed in the Response dated February 22, 2006.

The present invention discloses a pie filled with frozen fruit and teaches a method for manufacturing a pie filled with frozen fruit that includes the steps of mixing pie dough ingredients, forming the pie dough into a pie shell, adding individually quickly frozen ("IQF") fruit into the pie shell, depositing a suspension over the IQF, applying a top sheet of pie dough over the suspension, IQF fruit and pie shell which completes the frozen fruit filled pie product assembly, transporting the frozen fruit filled pie product in an initial frozen state; and baking the frozen fruit filled pie product. The method described above includes additional unique features including that the IQF fruit remains frozen throughout the manufacturing process, and that the suspension is made of a range of about 38% to about 88% liquid sweetener, a range of about 5% to about 55% dry sweetener, a range of about 4% to about 15% food starch, and a range of about 0.01% to about 5% food gum. This unique composition allows the suspension to exhibit the following unique properties: the suspension in the initial frozen state exhibits a reduction of viscosity when exposed to heat causing IQF fruit to disperse in the suspension, and exhibits an increase of viscosity when exposed to temperatures above 120° Fahrenheit.

The present invention is also directed toward a method for suspending frozen fruit in a pie filled with frozen fruit having ingredients of various specific gravities which includes the following steps: mixing a first set of ingredients to form a suspension which includes a range of about 38% to about 88% liquid sweetener, a range of about 5% to about 55% dry sweetener, a range of about 4% to about 15% food starch, and a range of about 0.01% to about 5.0% food gum, mixing a second set of ingredients to create pie dough, forming a portion of said pie dough into a pie shell, adding individually quickly frozen ("IQF") fruit into the pie shell, adding the suspension over the IQF fruit in the pie shell, the suspension used to suspend said IQF fruit in a uniform distribution upon baking of the pie filled with frozen fruit; and applying a top sheet of pie dough over the suspension, IQF fruit and pie shell to complete the frozen fruit filled pie product assembly, wherein said IQF fruit remains frozen throughout the manufacturing process, transporting the frozen fruit filled pie product in an initial frozen state; and baking the frozen fruit filled pie product, wherein the suspension in the initial frozen state exhibits a reduction of viscosity when exposed to heat allowing IQF fruit to disperse in the suspension, and wherein the

suspension exhibits an increase of viscosity when exposed to temperatures above 120° Fahrenheit.

As can be seen, the method for forming a suspension also includes the unique features described above in which the IQF fruit remains frozen throughout the manufacturing process, and a suspension composed of ingredients which allows it to exhibit the unique properties of reducing in viscosity from an initial frozen state when heated, which causes IQF fruit to disperse in the suspension, and then the heated suspension exhibits an increase of viscosity when exposed to temperatures above 120° Fahrenheit, causing the suspended fruit to be locked into the suspension.

The present invention provides advantages over the prior art. For example, the methods enable IQF fruit to remain frozen throughout the production process. This allows the IQF fruit to be thawed one time, i.e., once it is baked in a consumer's oven. Maintaining IQF fruit in a frozen state includes several advantages. First, because the IQF fruit does not thaw, flavor cannot escape the fruit pieces, and instead is locked in. Next, IQF fruit that remains frozen prevents seepage of water from the fruit into the pie dough, which can make the pie crust soggy. Further, IQF fruit that remains frozen during production does not need to be re-frozen, which reduces energy costs attributed to the process of freezing finished pie products.

The present invention also involves depositing the suspension over IQF fruit. This provides another advantage over typical production processes because energy costs attributed to heating and stirring the suspension together with the fruit is removed. Stirring costs may become especially expensive for typical production processes because as fruit and sugars/syrups/gums/starches are heated, the viscosity of the suspension increases, and in order to maintain a mixture, near continuous stirring is required.

The suspension provided in the present invention exhibits properties that allow it to inherently mix with IQF fruit and fruit juices after the pie production process has finished, i.e., after the frozen fruit filled pie is transported. This is because as the suspension is heated from frozen during baking, the viscosity is reduced and naturally mixes with the IQF fruit forming a fruit suspension. Throughout the cooking/heating process the IQF fruit thaws and the fruit juices disperse into the suspension, without making the suspension watery, while causing the fruit flavors to disperse throughout the fruit suspension. This is unlike other frozen pie products which become watery when heated due to water released from the fruit.

The suspension then increases in viscosity after it is heated above 120° Fahrenheit. This prevents the suspension from boiling over the pie crust at higher temperature compared to a typical pie filling which has a lower viscosity and is more apt to bubble over the edge of the pie crust. When the baked pie product is cut for serving, the viscosity-increased suspension prevents the pie piece from collapsing.

The above-mentioned benefits provided by the present invention provides a finished pie having very desirable characteristics for the consumer.

In addition, use of the above methods reduces production times and energy costs are reduced compared to typical methods. Thus, profitability of producing pie products is increased.

Now the references of record are considered.

In contrast to the present invention, Neumann discloses a food product with flavoring and a method for producing the same.

Wallin, in contrast to the present invention, discloses a high stability, high flavor, breakfast pastry and method for preparing the same.

Neumann and Wallin, alone or in combination, fail to disclose, suggest, or provide any motivation or expectation of success to one of ordinary skill in the art, the present invention.

In particular, the present invention includes a suspension which is composed of: a range of about 38% to about 88% liquid sweetener; a range of about 5% to about 55% dry sweetener; a range of about 4% to about 15% food starch; and a range of about 0.01% to about 5.0% food gum.

In contrast, the Neumann reference fails to disclose or suggest a suspension for a frozen fruit pie having a composition that includes a range of about 4% to about 15% food starch.

The Wallin reference too fails to disclose or suggest suspension for a frozen fruit pie having a composition that includes a range of about 4% to about 15% food starch.

Therefore, the Neumann reference and the Wallin reference, alone or in combination, fail to disclose, suggest, or provide any motivation or expectation of success to one of ordinary skill

in the art, forming any suspension which is composed of: a range of about 38% to about 88% liquid sweetener; a range of about 5% to about 55% dry sweetener; a range of about 4% to about 15% food starch; and a range of about 0.01% to about 5.0% food gum.

Furthermore, the obviousness rejection in the Office Action is improper where it states “it would have been obvious to one skilled in the art to increase the amount of starch when one wants a thicker more viscous composition.” This is because the composition of the suspension of the independent claims, which includes 4-15% food starch, exhibits both a decrease in viscosity and an increase in viscosity when exposed to heat. Neither Neumann nor Wallin, alone or in combination, disclose, suggest, or provide any motivation or expectation of success to one of ordinary skill in the art production of a suspension having such properties. In addition, the application states that for typical pies the amount of starch normally used is *greater* than what is currently taught. See page 8, lines 30-31. Compared to typical pie production, present embodiments use a decreased amount of food starch in the suspension. Accordingly increasing the amount of starch from typical pie production methods would result in a suspension having more than 15% food starch. Therefore, the Examiner has failed to establish a *prima facie* case of obviousness at least on this basis.

In addition, the present invention includes applying a top sheet of pie dough over the suspension, IQF fruit and pie shell to complete the frozen fruit filled pie product assembly, wherein said *IQF fruit remains frozen throughout the manufacturing process.*

In contrast, Neumann discloses adding flavoring to food products that have been pre-baked or adding flavoring inclusions to unbaked cereal-based products. Neumann fails to teach or suggest to one of ordinary skill in the art application of a top sheet of pie dough over IQF fruit which remains frozen throughout the manufacturing process. Because of this, Neumann fails to provide any motivation or expectation of success to one of ordinary skill in the art that the flavoring is added to anything that is frozen throughout the manufacturing process.

Wallin, in contrast to the invention, discloses adding flavoring to unbaked dough pads and does not mention that the dough pads or the flavoring is frozen throughout the manufacturing process. Wallin fails to teach or suggest to one of ordinary skill in the art applying a top sheet of pie dough over IQF fruit which remains frozen throughout the manufacturing process. Because of this Wallin fails to provide any motivation or expectation of

success to one of ordinary skill in the art that the flavoring is added to anything that is frozen throughout the production process.

Neumann and Wallin, alone or in combination, fail to disclose, suggest, or provide any motivation or expectation of success to one of ordinary skill in the art, the present invention's applying a top sheet of pie dough over the suspension, IQF fruit and pie shell to complete the frozen fruit filled pie product assembly, wherein said *IQF fruit remains frozen throughout the manufacturing process.*

Moreover, the present invention includes transporting the frozen fruit filled pie product in an *initial* frozen state; and baking the frozen fruit filled pie product.

Neumann discloses adding flavoring toppings to cereal-based products that are baked and shipped. Neumann fails to teach or suggest to one of ordinary skill in the art transporting the frozen fruit filled pie product in an initial frozen state. Because of this, Neumann fails to provide any motivation or expectation of success to one of ordinary skill in the art an unbaked product that is transported in an initial frozen state.

Wallin discloses cooking a pastry product before shipping. Wallin fails to teach or suggest to one of ordinary skill in the art transporting the frozen fruit filled pie product in an initial frozen state. Because of this, Wallin fails to provide any motivation or expectation of success to one of ordinary skill in the art an unbaked product that is transported in an initial frozen state.

Therefore, the Neumann reference and the Wallin reference, alone or in combination, fail to disclose, suggest, or provide any motivation or expectation of success to one of ordinary skill in the art, transporting a frozen fruit filled pie product in an *initial* frozen state.

The present invention further includes baking the frozen fruit filled pie product, wherein the suspension in the initial frozen state exhibits a reduction of viscosity when exposed to heat allowing IQF fruit to disperse in the suspension, and wherein the suspension exhibits an increase of viscosity when exposed to temperatures above 120° Fahrenheit.

In contrast, Neumann discloses the flavored topping “[a]fter reconstitution . . . does not run or drip if eaten cut, sliced, tilted, or inverted.” Neumann Col. 2, Ins. 12-14. “[T]he flavoring does not significantly drip from or penetrate into the cooked product. Neumann Col. 3, Ins. 58-60. Thus Neumann fails to teach or suggest, or provide any motivation or expectation of success

to one of ordinary skill in the art, a suspension which exhibits an decrease in viscosity when heated from frozen, and when increases in temperature above 120° F. increases in viscosity.

In contrast to the present invention, Wallin discloses the suspension is deposited into slits formed in a dough pad but does not subsequently mix with the cooked or heated dough pad. Wallin fails to remedy the deficiencies of Neumann and does not teach or suggest, or provide any motivation or expectation of success to one of ordinary skill in the art, a suspension having properties which causes it to decrease in viscosity when heated from frozen, and to increase in viscosity when heated above 120° F.

The combination of Neumann and Wallin also do not facilitate forming a suspension of the filling composition in which the suspension when heated from frozen decreases in viscosity until it reaches temperatures above 120° F. in which the suspension increases in viscosity. Because Neumann and Wallin, alone or in combination, fail to disclose, suggest, or provide any motivation or expectation of success to one of ordinary skill in the art, a suspension capable of forming a mixture which decreases in viscosity when heated from frozen, nor subsequently increasing in viscosity when heated above 120° Fahrenheit, the invention meets the requirements of 35 U.S.C. § 103.

It is well settled that it is not proper to selectively extract individual elements from the different contexts of different references and then combine those selectively extracted elements to arrive at a claimed combination. Rather in considering the elements within the references, the references must be considered as a whole, it being impermissible to pick and choose from a reference only so much of it as will support a given position. *In re Wesslau*, 353, F.2d 238, 147 USPQ 391 (CCPA 1965); *W.L. Gore & Associates, Inc. v. Garlock, Inc.*, 721 F.2d 1540, 220 USPQ 303 (Fed. Cir. 1983), cert. denied, 469 U.S. 851 (1984). There is a rigorous requirement that there must be some motivation, suggestion or teaching of the desirability for selecting the elements and combining those elements in the specific combination of the invention, and the motivation, suggestion or teaching must be disclosed in the reference(s). *In re Kotzab*, 217 F.3d 1365, 54 USPQ2d 1308, 1316 (Fed. Cir. 2000); *In re Oetiker*, 977 F.2d 14343, 24 USPQ2d 1443 (Fed. Cir. 1992). In the absence of such motivation, suggestion or teaching, it is immaterial that some, or even all, of the elements in a specific combination of an invention are known in the art. As clearly stated in *In re Rouffet*, 149 F.3d 1350, 1357, 47 USPQ2d 1453 (Fed. Cir. 1998):

As this court has stated, “virtually all [inventions] are combinations of old elements.” *Environmental Designs, Ltd. v. Union Oil Co.*, 713F2d 693, 698,218 U.S.P.Q. (BNA) 865, 870 (Fed. Cir. 1983); see also *Richdel, Inc. v. Sunspool Corp.*, 714 F2d 1573, 1579-80, 219 U.S.P.Q. (BNA) 8, 12 (Fed. Cir. 1983) (“Most, if not all, inventions are combinations and mostly of old elements.”). Therefore an examiner may often find every element of a claimed invention in the prior art. If identification of each claimed element in the prior art were sufficient to negate patentability, very few patents would ever issue. Furthermore, rejecting patents solely by finding prior art corollaries for the claimed elements would permit an examiner to use the claimed invention itself as a blueprint for piecing together elements in the prior art to defeat the patentability of the claimed invention. Such an approach would be “an illogical and inappropriate process by which to determine patentability.” *Sensonics, Inc.. v. Aerasonic Corp.*, 81 F.3d 1566, 1570, 38 U.S.P.Q.2D (BNA) 1551,1554 (Fed. Cir. 1996).

and:

To prevent the use of hindsight based on the invention to defeat patentability of the invention, this court requires the examiner to show a motivation to combine the references that create the case of obviousness. In other words, the examiner must show reasons that the skilled artisan, confronted with the same problems as the inventor and with no knowledge of the claimed invention, would select the elements from the cited prior art references for combination in the manner claimed.

The references cited in the December 22, 2005 Office Action do not provide motivation, suggestion or teaching, and no showing has been made otherwise identifying in the references such a motivation, suggestion or teaching, for selecting elements from the cited references to render obvious the method recited in the claims, and the invention cannot be used as a blueprint for identifying a suggestion or motivation. As stated in *In re Dembicza*k, 175 F.3d 994, 999, 50 U.S.P.Q.2d (BNA) 1614 (Fed. Cir. 1999):

Our case law makes clear that the best defense against the subtle but powerful attraction of a hindsight-based obviousness analysis is rigorous application of the requirement for a showing of the teaching or motivation to combine prior art references. See,

e.g., *C.R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340, 1352, 48 U.S.P.Q.2D (BNA) 1225, 1232 (Fed. Cir. 1998) (describing “teaching or suggestion or motivation [to combine]” as an “essential evidentiary component of an obviousness holding”); *In re Rouffet*, 149 F.3d 1350, 1359, 47 U.S.P.Q.2D (BNA) 1453, 1459 (Fed. Cir. 1998) (“the Board must identify specifically... the reasons one of ordinary skill in the art would have been motivated to select the references and combine them”); *In re Fritch*, 972 F2d 1260, 1265, 23 USP.Q.2D (BNA) 1780, 1783 (Fed. Cir. 1992) (examiner can satisfy burden of obviousness in light of combination “only by showing some objective teaching [leading to the combination]”); *In re Fine*, 837F.2d 1071, 1075, 5 U.S.P.Q.2D (BNA) 1596, 1600 (Fed. Cir. 1988) (evidence of teaching or suggestion “essential” to avoid hindsight); *Ashland Oil, Inc. v. Delta Resins & Refractories, Inc.*, 776 F.2d 281, 297, 227 U.S.P.Q. (BNA) 657, 667 (Fed. Cir 1985) (district court's conclusion of obviousness was error when it “did not elucidate any factual teachings, suggestions or incentives from this prior art that showed the propriety of combination”). See also *Graham*, 383 U.S. at 18, 148 U.S.P.Q. (BNA) at 467 (“strict observance” of factual predicates to obviousness conclusion required). Combining prior art references without evidence of such a suggestion, teaching, or motivation simply takes the inventor's disclosure as a blueprint for piecing together the prior art to defeat patentability--the essence of hindsight. See, e.g., *Interconnect Planning Corp. v. Feil*, 774 F2d 1132, 1138, 227 U.S.P.Q. (BNA) 543, 547 (Fed. Cir. 1985) (“The invention must be viewed not with the blueprint drawn by the inventor, but in the state of the art that existed at the time.”). In this case the Board fell into the hindsight trap.

It is believed that all of the issues raised in the Office Action have been addressed herein. Should the Examiner maintain any of the rejections of any of the pending claims, it is respectfully requested that it be pointed out with particularity how the cited reference(s) meet each and every term of each claim with respect to which rejection is maintained, and if the rejection is based on obviousness, identification of the specific motivation, suggestion or teaching in the art for combining elements in the specific combination of the invention.

For the above reasons, reconsideration and withdrawal of the § 103 rejection is requested.

**CONCLUSION**

This application now stands in allowable form, and reconsideration and allowance are respectfully requested.

A petition for an extension of time accompanies this paper, along with a check in the amount of \$120.00 for the petition fee. The commissioner is also authorized to charge any additional fees, including extension fees or other relief that may be required, or credit any overpayment to Deposit Account No. 04-1420.

Respectfully submitted,

DORSEY & WHITNEY LLP

**Customer Number 25763**

Date: April 24, 2006

By:

*Bridget Hayden*

Bridget Hayden, Esq., Reg. No. 56,904  
(612) 492-6867